IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

WP(C).No. 16129 of 2007(T)

AGAINST THE ORDER IN OS 314/2006 IN OS.320/2006 of MUNI-MAGI.COURT,THODUPUZHA

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PETITIONER:

SUNNY, AGED 45 YEARS, S/O OUSEPH, KANAKOMBIL HOUSE, CHEENIKUZHY BHAGAM, EDAMARUKU KARA, UDUMBANNOOR VILLAGE, THODUPUZHA.

BY ADV. SRI.K.K.CHANDRAN PILLAI
SRI.R.V.SATHYAPRIYAN NAIR

RESPONDENTS:

SUSHAMA, W/O SIVAN, PARADIYL HOUSE, CHEERIKUZHY BHAGAM, EDAMARUKU KARA, UDUMBANNOOR VILLAGE, THODUPUZHA TALUK.

BY ADV. SRI.T.R.HARIKUMAR
SRI.V.G.ARUN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.16129/2007 T

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF I.A.NO.1445/06 IN O.S.314/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P2: **COPY OF COMMISSION REPORTIN I.A.NO.1445/06 IN O.S.314/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P2(A): **COPY OF SKETCH IN COMMISSION REPORT IN I.A.1445/06 IN O.S.314/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P3: **COPY OF OBJECTION TO THE INJUNCTION PETITION I.A.NO. 1445/06 IN O.S.NO.314/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P4: **COPY OF PLAINT DTD. 3/11/2006 NO.320/06 FILED BEFORE THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P5: **COPY OF INJUNCTION PETITION IN O.S.320/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P6: **COPY OF COMMISSION REPORT IN I.A.1474/06 IN O.S.320/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P7: **COPY OF COMMON ORDER DTD. 24/11/2006 IN I.A.1445/06 AND I.A.1473/06 PASSED BY THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P8: **CERTIFIED COPY OF THE COMMON JUDGMENT DTD. 16/12/2006 IN CMA.79 AND 80/06 PASSED BY THE DISTRICT COURT, THODUPUZHA.**

EXT.P9: **COPY OF PETITION IN I.A.51/07 IN O.S.32/06 DTD. 10/01/2007 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P10: **COPY OF OBJECTION FILED IN I.A.NO.51/07 IN O.S.320/06 DTD. 22/02/2007 BEFORE THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P11: **COPY OF ORDER DTD. 27/02/2007 PASSED IN I.A.51/07 IN O.S.320/06 PASSED BY THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P12: **COPY OF I.A.397/07 IN I.A.51/07 IN O.S.320/06 DTD. 13/03/2007 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P13: **COPY OF OBJECTION DTD. 21/03/07 IN I.A.397/07 IN I.A.51/07 IN O.S.320/06 ON THE FILE OF THE MUNSIFF'S COURT, THODUPUZHA.**

EXT.P14: **COPY OF ORDER DTD. 23/03/2007 IN I.A.397/07 IN I.A.51/07 IN O.S.320/06 OF THE MUNSIFF'S COURT, THODUPUZHA.**

/TRUE COPY/

KSS **P.S.TO JUDGE**

M.N.KRISHNAN, J

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W.P.(C) No.16129 OF 2007

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Dated this the 13th day of September 2007

JUDGMENT

This writ petition is field challenging Exts.P11 and P14 orders of the Munsiff's Court, Thodupuzha. The brief facts necessary for the disposal of the writ petition are stated as follows: The present writ petitioner filed a suit for injunction as O.S.No.314 of 2006 and a Commissioner visited the property and prepared Exts.P2 and P2(a). Defendants in the suit then filed a suit for mandatory injunction as O.S.No.320 of 2006 and Ext.P6 is the report submitted by yet another Commissioner in that case. Thereafter the court proceeded to decide the injunction application in O.S.No.314/2006 and interim mandatory injunction application in O.S.No.320/2006, rejected the prayer for injunction and granted relief for interim mandatory injunction. Against that, C.M.A.Nos.79 & 80 of 2006 were filed by the present writ petitioner before the Addl.District Court, Thodupuzha and the District Judge by Ext.P8 order dated 16.12.2006 remanded the case for fresh disposal. In paragraph 17 of the said order, the court held that "both counsel expressed their desire to get the property examined and the matter clarified

by a third commission which I am not inclined to entertain in the C.M.As. Thereafter the court set aside the orders, remanded the cases back to the trial court and directed to consider the Commission application, if any, filed and to dispose of the matter after receiving the report of the Commissioner. Thereafter the plaintiff in O.S.No.320 of 2006 moved an application for issuance of a fresh Commission and the court below passed an order appointing the Commissioner, who inspected the property earlier in O.S.No.320/2006. Dissatisfied with the appointment of the said Commissioner, plaintiffs in O.S.No.314 of 2006 moved an application to change the Commissioner, but it was dismissed by the learned Munsiff by Ext.P14 order.

2. Now the question that has to be considered by the court is whether the order of the court below appointing one of the Commissioners, who had visited the property to revisit the property is proper in the light of their submissions before the appellate court and in the light of the application filed before the court below. Learned counsel for the parties before the appellate court really wanted the 3rd Commissioner to go and inspect the property and submit the particulars. Most probably with that in mind the plaintiff in O.S.No.320/2006 filed Ext.P9 application with a prayer to appoint a new Commissioner. But the court, instead of doing the same,

appointed the very same Commissioner, who had submitted his report earlier. Now there are already two Commissioners' plans and reports before court. Both the parties are not satisfied with those reports. I am conscious of the fact that as far as possible, issuance of a successive Commissions in the very same suit by appointing different Commissioners cannot be done for the reason that conflicting reports may be filed and instead of helping the court to resolve the dispute, it will create controversy and confusion. But here is a case where already two Commissions had gone. One party is satisfied with one report whereas the other party is satisfied with the other report. What is the correct position is a matter which has to be ascertained by the court for deciding the issue. Most probably to find a way out, the counsel for the parties before the appellate court suggested for the issuance of a 3rd Commission to note down the particulars and in compliance with the same, the party also moved an application for appointment of a new Commission.

3. Taking into consideration the peculiar facts and circumstances of the case and the way in which the matter is to be dealt with, I feel it is desirable that an experienced Commissioner be appointed to submit a plan and report by permitting both the parties to file work memo before the Commissioner. At the same time, it is equally important to preserve the

things which were in existence on the date of the suit and it can be so done by directing the previous reports on record.

4. Therefore, the court below is directed not to brush aside the previous Commissioner's plans and reports, but permit the parties to adduce evidence and decide on certain facts which are more reliable and dependable. So reserving the right of the parties to have the previous Commissioner's plan and report on the file and with liberty for them to adduce evidence in support or against such plans and reports, the court below is directed to appoint an experienced Commissioner to visit the property and submit a fresh plan and report and also by permitting both the parties to file work memo before the Commissioner so that the points which they want to know can be noted by the Commissioner.

Therefore the orders under challenge are set aside and the writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-